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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LAYTON B. CULBERTSON,

Defendant and Appellant.

D059931

(Super. Ct. No. SCD223441)

APPEAL from a judgment of the Superior Court of San Diego County, Charles G. Rogers, Judge. Affirmed.

Appellant Layton B. Culbertson raises two contentions on appeal. First, he contends the trial court erred when it imposed consecutive 15-years-to-life sentences on counts 1, 2, 3, 4 and 15 because there allegedly is no "legally acceptable way to resolve or reconcile" what he claims are factual ambiguities in the record as to "which conduct provided the basis for these convictions" and because the trial court, as trier of fact, allegedly did not specify the conduct it was relying on when it imposed sentence on these

counts. As a result, Culbertson contends his sentence on these counts must be reversed on the grounds it violates due process and raises ex post facto concerns.

Second, Culbertson contends his conviction in count 7 must be reversed because there was insufficient evidence that an act of sexual intercourse occurred with a child victim of 14 or 15 years, as required under former Penal Code<sup>1</sup> section 288, subdivision (c)(1).

As we explain, we reject both contentions and affirm Culbertson's judgment of conviction and his sentence.

## FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>

### A. *Overview of Charges*

The information alleged Culbertson had committed a lewd act on a child under the age of 14 years (§ 288, subd. (a) (counts 1-4 and 15-17)); a lewd act on a child 14 or 15 years of age who was more than 10 years younger than Culbertson (§ 288, subd. (c)(1) (counts 5-8)); incest (§ 285 (counts 9 & 10)); unlawful sexual intercourse with a minor who was more than three years younger than Culbertson (§ 261.5, subd. (c) (counts 11-12, 18-19, 22-23 & 26-27)); oral copulation with a minor under the age of 18 years (§ 288a, subd. (b)(1) (counts 13-14, 20-21, 24-25 & 28-29)); oral copulation with a minor under the age of 16 while Culbertson was at least 21 years of age (§ 288a, subd. (b)(2)

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<sup>1</sup> All statutory references to the Penal Code unless otherwise noted.

<sup>2</sup> We view the evidence in the light most favorable to the judgment of conviction, to the extent there is a conflict in the evidence. (See *People v. Osband* (1996) 13 Cal.4th 622, 690.) Certain portions of the factual and procedural history related to Culbertson's claims of alleged error are discussed *post*, in connection with those issues.

(count 30)); and had possessed matter depicting a person under the age of 18 years engaging in sexual conduct (§ 311.4, subd. (d) (count 31)).

The amended information further alleged with respect to counts 1 through 4 and 15 through 17, that Culbertson had committed the offenses against more than one victim within the meaning of sections 667.61, subdivisions (b), (c) and (e), and 1203.066, subdivision (a)(7); had engaged in substantial sexual conduct with a child under the age of 14 years within the meaning of section 1203.066, subdivision (a)(8); and had used matter within the meaning of section 1203.066, subdivision (a)(9), during the commission of the offenses.

Following a section 998 hearing, the trial court dismissed counts 8 and 25.

At the conclusion of a bench trial, the court made not true findings regarding the enhancement alleged under section 1203.066, subdivision (a)(9) in connection with counts 1 through 4 and 15 through 17 and found Culbertson not guilty of count 16. The trial court found Culbertson guilty of all the remaining counts and made true findings with respect to all remaining enhancements and special allegations.

Counts 1 through 7 and 9 through 14 involved Culbertson's daughter. Counts 15 and 16 involved Culbertson's older son, his daughter's twin brother. The counts involving the twins allege conduct by Culbertson that began in 2004, when they were 11 years old, to the time of Culbertson's arrest in October 2009, when they were 16 years old. Count 17 involved Culbertson's younger son.

The remaining counts allege conduct that occurred in 2009 before Culbertson's arrest, and involve four females all under 18 years of age who were friends of the twins

and/or each other: T. (counts 18-21), J. (counts 22-24), N. (counts 26-29) and Y. (count 30).

*B. Case-in -Chief*

In mid-October 2009, N.H. told a school counselor that sexual activities involving him, Culbertson and other minors were taking place at Culbertson's home, where Culbertson lived with his three minor children, the twins and Culbertson's younger son. Culbertson was the primary caretaker of the three children, as his wife was then active duty military and often deployed for extended periods.

Detective Leslie Albrecht interviewed N.H. and his sister J., a few days after N.H.'s report. Detective Albrecht obtained a search warrant for Culbertson's residence and executed it early in the morning on December 20, 2009.

When detectives arrived with the search warrant, they found Culbertson there with T., then 16 years old. Among other items, detectives found a video camera, still photographs and Culbertson's mobile phone. Detective Albrecht testified that all three devices contained multiple images of Culbertson engaged in sexual activities with minors, including with his daughter. The images also depicted his older son having sex with his girlfriend N.; his daughter having sex with N.; Culbertson having sexual intercourse individually with his "girlfriend" T., and with N.; and T. having sex individually with his daughter, N. and his older son.

Detective Albrecht testified the images also depicted group sex encounters including between Culbertson, T. and his older son, during which Culbertson sodomized T. while she orally copulated his older son; between Culbertson, N. and his older son;

between Culbertson, his daughter and T.; between Culbertson, T. and N.; and between Culbertson, T., N. and his daughter, during which T. first orally copulated Culbertson, while the other two females sucked on Culbertson's nipples, and next T. had intercourse with Culbertson while the other two females engaged in sex acts together.

Detective Albrecht also testified that one of the videos recovered from the search of Culbertson's residence showed the younger son, then aged nine, with his hand on his sister's naked buttocks while she is orally copulating T. Another video shows the daughter and T. engaging in sexual activity on a bed while the younger son sits naked on that same bed and exclaims, "You are so lucky, daddy." As Culbertson replies on the video, "I'm not the only one. You are lucky too," Culbertson hands the camera to his younger son and then joins his daughter and T. in their sexual encounter as his younger son gets off the bed, circles around the group and continues recording the encounter.

N.H. testified that Culbertson replayed videos taken by Culbertson of N.H. and his daughter having sexual intercourse. N. testified that she participated "a lot" in multiple sex acts with Culbertson and other partners, including T. and the twins and that these encounters were videotaped. N. testified that she first had sexual intercourse with, and orally copulated, Culbertson in late 2008 when she was 15 years old and that she continued to have sexual intercourse with, and orally copulate, him in 2009 before his arrest. She also testified that she was in a video where T. used a dildo on her, that it hurt and thus she told Culbertson that it hurt so they discontinued using the dildo.

Culbertson often supplied the minors with tobacco, alcohol, marijuana, cocaine and methamphetamine. N.H. testified Culbertson also allowed his younger son to smoke out of a hookah.

Detective Albrecht testified that on many of the videos it was possible to see and/or hear pornographic videos in the background while Culbertson was engaged in sexual encounters with his victims. The videos that had been downloaded onto the computers in Culbertson's residence contained depictions of minors having sex, bestiality, incest, rape, bondage, discipline and acts of sadism. In addition, Detective Albrecht testified the videos showed various dildos being used either by the minors having sex with each other and/or with Culbertson.

J., the sister of N.H., testified at trial that she engaged in three separate sexual acts with Culbertson. In the first incident, when she was just finishing 10th grade, Culbertson sent J. computer messages saying that she "owed" him because her brother was living at Culbertson's residence. The next day, J. visited her brother at the Culbertson residence. At some point, the daughter suggested that J. speak to Culbertson because J. was upset by and afraid of Culbertson based on his statements that she "owed" him. When they went to Culbertson's bedroom to talk, Culbertson told his daughter to leave and then got on top of and put his penis inside J.'s vagina. J. testified that she did not give Culbertson permission to engage in sexual intercourse, that she could not move because he was on top of her and that all she did during the encounter was cry. When Culbertson finished, J. testified she grabbed her clothes and ran out of the bedroom. J. did not tell either her brother N.H. or the daughter what had happened as they walked her home.

J. also testified to engaging in a sex act with Culbertson inside his van that was parked in the garage of the Culbertson residence. This incident likely occurred in the summer of 2009, before J. began 11th grade. J. testified she was "forced" to give Culbertson oral sex inside the van while his daughter was present. The daughter then left and returned to the van with T. Once inside, T. started sucking on Culbertson's nipples while J. continued to orally copulate Culbertson. J. testified that she was openly crying as she orally copulated Culbertson.

J. also testified to a third sexual encounter with Culbertson when they were inside his bedroom and he took off her pants and put his penis inside her vagina. J. said she openly cried during that encounter.

Y. testified that in April 2008, when she was 14 years old, the daughter asked her to spend the night at the Culbertson residence so the two of them could go to the mall early the next morning. When Y.'s aunt objected, Culbertson drove his daughter to the aunt's house and convinced the aunt to allow Y. to speak with his daughter inside the van. Once Y. was inside, Culbertson drove to an isolated location where she and his daughter smoked marijuana. While in the van, Culbertson told Y. that he had always been attracted to her.

Once back at the Culbertson residence, Culbertson took Y. into his bedroom, played pornographic videos and told her he wanted to have sex. When Y. told Culbertson that she would rather have sex with his older son, Culbertson left the bedroom, returned with his older son and watched as Y. and his older son had sexual

intercourse, even taking at least one picture of them during that encounter. During that same evening, Y. also touched Culbertson's penis and orally copulated him.

Y. testified that she smoked "a lot" of marijuana that night and that, although she had smoked marijuana before, it had never affected her the way it affected her that night when she engaged in sexual acts with the older son and Culbertson. Y. testified "everything was really slow" that night and she felt like she was "floating."

Both twins testified that in 2009, before Culbertson's arrest, there were two "house rules" imposed by their father that had to be followed. The first rule was if you wanted to have sex, you had to ask Culbertson for permission and if he said "yes," then fine, but if he said "no," then no sex was allowed. According to his daughter, Culbertson had this rule because he usually wanted to be present to watch the sexual encounter. The twins also testified that their father's other rule was "what goes on in the house stays in the house," or words to that effect.

The younger son testified his father first began to talk about sex when he and his twin sister were in the sixth grade. During that year when the twins were 12 years old, in order to teach them about sex Culbertson took them to his bedroom and instructed the twins to take off all their clothes. While present in the room, Culbertson then had his older son touch his twin sister's breasts and perhaps her vagina,<sup>3</sup> and then had his daughter touch her twin brother's penis. As discussed *post*, the older son testified similar

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<sup>3</sup> The older son on direct testified he only touched his twin sister's breasts during this first incident, but later on redirect testified he also touched her vagina while the twins were in Culbertson's bedroom.



incidents of sexual touching between him and his sister occurred later that same year and also the following year, when the twins were 13 years of age.

The older son testified that while in 7th grade he saw his twin sister "more than once" touch their father's penis and "suck[] on it." As discussed in more detail *post*, on one instance when the twins were 13 years old the older son testified he awakened late one night, went into the kitchen and saw his twin sister naked and orally copulating their father's erect penis. In response, Culbertson directed his older son to come closer and as he approached, the older son took off some of his clothes and his twin sister then began orally copulating him.<sup>4</sup>

When asked at trial why he took off his own clothes that night in the kitchen, the older son testified it was because "that's what I thought my dad wanted to see." According to the older son, beginning in 6th grade Culbertson told the twins that "what [Culbertson] really want[ed] to see is [them] go at it, and that's by touching [each] other and having sex in front of [him] while [he's] watching."

The daughter testified about a sexual encounter with her father when she was in 7th grade where, at his direction, she touched his penis and then orally copulated him while they were in the garage at their residence. The daughter could not remember whether there were other similar incidents during her 7th grade year but said, "It may have happened."

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<sup>4</sup> As discussed *post*, at a later point in his trial testimony the older son said he and his twin sister did not have oral sex or intercourse together until they were in the 10th grade.

The daughter testified that beginning in 9th grade, the sexual encounters between her and her father "happened a lot" and were a "common occurrence" until his arrest in October 2009. When asked how frequently she and her father had sexual intercourse, the daughter testified "not as much" as oral sex, and estimated they had intercourse "only a few times."

The daughter testified about a "contract" handwritten by her father. The contract was between her and Culbertson and included terms for punishment (e.g., chores) if she did not tell the truth or used profanity on social media. The contract also provided: "Whatever Dirk says to do I [the daughter] must unless I show that I am busy or tired."<sup>5</sup> In addition, under the "contract" the daughter was to give her father "head" at least four times a week, which the daughter testified meant orally copulating him; was to "hook him up with a fine friend," which the daughter testified meant setting up her father for "sexual things" with one of her friends "who [is] cute and fine"; and was to watch porn movies with him "when he asks."

In addition, the "contract" provided that Culbertson would let his daughter off "punishment" as soon as she "please[s] him in front of whom he chooses tonight orally or tomorrow, no delays." The daughter testified this provision meant her father would "pick someone for me to orally have sex with, mouth to penis kind of thing" while he watched.

The younger son testified that on the day he turned nine years old, his father told him he had something "special" for his birthday. The younger son testified his father put

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<sup>5</sup> The daughter testified that "Dirk" was the nickname she gave her father's penis.

him in his father's room and then his older brother brought N. into the room, and he and N. had sexual intercourse in front of his older brother. N. confirmed that on the day of the younger son's 9th birthday, Culbertson asked her to have sexual intercourse with his younger son. At first, N. testified she did not want to have intercourse with the younger son but finally agreed to do so to be "nice." N. also testified she orally copulated the younger son that day, and that he may have orally copulated her. N. testified she saw Culbertson come into the room at least two times while she and the younger son were involved in sexual activity.

### *C. Defense Case*

During a post-arrest interview, Culbertson maintained that N. and T. had both told him they were at least 18 years old before he had sex with them. Culbertson confirmed two incidents of oral sex occurred with J., but denied having sexual intercourse with her. Culbertson also confirmed having sex with his daughter on three occasions, once in the living room and twice in his bedroom. Culbertson told detectives that in connection with sex, "[as l]ong as you're not takin[g] it or forcing anybody to do anything, it's not bad," it "was an educational thing" and he would rather have his children learn about sex at home "than learn on the streets."

Culbertson testified that he and his daughter had intercourse and oral sex, and that she masturbated him, but maintained that none of these activities occurred before 2009. He claimed his daughter was "mistaken" regarding when the touching occurred, and similarly claimed his older son was wrong when he testified about sexual activities involving Culbertson before 2009. Instead, Culbertson testified he began educating the

twins about sex in 2009 and that none of the sex acts involving either twin occurred when they were under 16 years of age.

Regarding T., Culbertson considered her to be his "girlfriend" and claimed he did not have sex with her until the day he believed she turned 18 years old. Culbertson recalled only one act of sexual intercourse and one act of oral copulation with T. after he learned from her mother she was under 18 years of age.

Regarding J., Culbertson testified he had oral sex with her twice, but claimed her Web site suggested she was 18 years old when that occurred.

Culbertson testified when he had sex with N., he had no idea how old she was and he never asked N. her age. Culbertson testified N. did not appear to be underage when they engaged in sexual activities.

Culbertson denied having had any sexual contact with Y.

With regard to his younger son and his "special" birthday present, Culbertson testified that when he walked into the bedroom that day the younger son was on his way out and N. was sitting on the bed talking to the older son. Culbertson claimed he had no knowledge of the sexual encounter between his younger son and N. until N. and his older son told him about the incident. According to Culbertson, the "special gift" he mentioned to his younger son was a motorcycle, not sex.

#### *D. Trial Court's Findings*

After hearing argument on the evidence submitted, the trial court made the following observations and findings, as relevant to this appeal:

"The task that the court has at this time is to sit as the trier of fact. That means that the court needs to determine the facts from the evidence. The court needs to consider those facts in light of the law that applies to each charge and each allegation. Each charge and allegation has to be proven beyond a reasonable doubt before a finding of guilt or a true finding may be made. The finding of guilt, of course, would refer to a substantive charge. And the true finding would refer to the allegations.

"I have taken in excess of three legal pads of my own handwritten notes as the testimony progressed. And, in addition, I have listened to the comments of both counsel. I won't engage in the process of reciting all the controlling legal principles, including those that deal with the assessment of evidence. But I do think a couple of things are worth mentioning.

"The first, of course, is the burden of proof, which the prosecution bears. I have applied that burden in all of my findings.

"The law contemplates and understands that there may be conflicts between the testimony of various witnesses. There may even be conflicts within the testimony of a given witness. The trier of fact is asked to spot those and be cognizant of them and reconcile them, if that can be done. And if it can't be done, then that becomes a material part of the court's finding. [¶] . . . [¶]

"I think it is also important for the court to be cognizant of how the law defines principals in the commission of an offense. A principal may either directly commit the offense, hands on, so to speak, or may aid and abet in its commission. We know that

aiding and abetting requires advising and encouraging in some fashion the act as well as actually aiding and abetting it. It also requires the requisite mental states be shown.

"I say this because it seems to me that an accused under facts such as those that have been presented in this court may be guilty of an offense if he [or she] directly does it. He [or she] may also be guilty of an offense if, with the requisite intent, he [or she] encourages and aids and abets Minor 1 in doing something to Minor 2 and vice versa.

[¶] . . . [¶]

"In general, I found all the child witnesses to be substantially credible in this case. By child witnesses, I refer to those who were victims and alleged victims and also to [N.H.], who is not a direct victim in this case, but who was one of the witnesses for the prosecution. . . . I find that these child witnesses were substantially credible in their testimony about when they met each other. For example, when [the twins] or [J.] or any of these children said that we met in middle school or in high school, I find that testimony to be credible.

"I think that these children were credible as well when they described the sex acts and the general circumstances under which those acts were committed. With the possible exception of [T.], I thought that these child witnesses did not appear to be minimizing in their testimony, even in areas where, as human beings, it is reasonable to expect someone might be tempted to minimize, either to make himself or herself look better or to protect somebody else.

"I don't find Mr. Culbertson's testimony to be credible. I don't find his statements to Detective Albrecht to be credible. [¶] . . . [¶]

"I found [N.'s] testimony to be highly credible. She presented as a very competent young woman. She is well spoken. As with most of the young women who testified here, I think that she has been significantly damaged by what was visited upon her. Nonetheless, she testified, in my view, truthfully and with a certain dignity and, despite all of this, a certain sense of self-esteem.

"[Y.] I find also to have been highly credible. When the acts that are reflected by count 30 were visited upon her by Mr. Culbertson, she never went back. I believe that she was truthful in the way she testified. It is a question for another day, but I agree with [the prosecution's] sentiments that Mr. Culbertson's conduct with respect to the [Y.] incident was . . . predatory. . . . Her testimony was credible.

"I find the same thing to be true with [J.]. She continued to go back to that house. I suspect there are some significant self-esteem issues with that young woman. But her testimony I find to be credible in all respects.

"[The older son] presented as something of a remarkable young man. He is smart, he is articulate, he is well spoken. I find him to be highly credible. I also find that his bottom line testimony with respect to dates and times is accurate. And I say this acknowledging that it was based, in part, upon the yearbook from . . . [a] middle school and, in his words or maybe mine, doing the math. But he was credible and never really wavered. I seem to recall even [the daughter] saying that [her twin brother] is real good on dates and times. I find [the older son] to be a credible witness.

"I don't know how to describe [the younger son] in any other way than to say he presented as a really cool little kid. He is smart, he is articulate, he is personable. He

didn't appear to me to be minimizing. He didn't remember exactly who said what when and who did what when. We had a little bit of conflict in that testimony. But his testimony is not the only testimony upon which count 17 is based. And I will address that in a few moments. [¶] . . . [¶]

"[The daughter] was credible. She candidly said, ['I am not very good with dates.[] That became apparent in the testimony, even with the yearbook. She got confused with respect to some dates and times. Again, I don't consider her testimony in a vacuum. I consider it in light of all the other testimony. I found no evidence that [the daughter] was deliberately attempting to minimize or lie in her testimony. [¶] . . . [¶]

"When I consider all the evidence and the burden of proof, I make the following findings:

"With respect to count 1, I find Mr. Culbertson guilty. I find the allegation under subdivision[s] (b), (c) [and] (e) of section 667.61 to be true. And I also find the substantial sexual contact or conduct allegation under section 1203.066, subdivision (a)(8) to be true.

"I do not find the use of sexual matter as alleged under subdivision (a)(9) of [section] 1203.066 to be true. I do not find that allegation to be true.

"Interestingly, with respect to some of these counts, the testimony indicates more than one scenario that could fit the counts. For instance, counts 1 and 2 [involving the daughter] I think also parallel counts 15 and 16 involving [the older son] if we are talking about the so-called education in which the defendant directed these children to touch each other. That's certainly true with respect to count 1. That would be true with respect to



count 2. And also with respect to count 2 we have that garage incident that [the daughter] testified to when she was in the 7th grade.

"I find the evidence establishes the requisite age and intent with respect to count 1. I make the same finding with respect to count 2. With respect to count 2, I find Mr. Culbertson guilty. I find the multiple victim allegation to be true. I find the substantial sexual conduct allegation to be true. I do not find the use of harmful matter allegation to be true.

"With respect to count 3, I find—well, count 3 and count 4, I find both of those counts are proven true beyond a reasonable doubt. I find the allegation of multiple victims to be true with respect to each of those counts. And with respect to count 3, I find the allegation of substantial sexual conduct to be true.

"With respect to count 3 and with respect to count 4, I do not find the use of harmful matter to be involved. So the allegations under subdivision (a)(9) [of section 1203.066] for counts 3 and count 4, there will be no true finding as to those allegations.  
[¶] . . . [¶]

"I find Mr. Culbertson guilty with respect to count 15. I think the testimony establishes the requisite age, [and] certainly the requisite intent.

"I find the multiple victim allegation true and the substantial sexual conduct allegation true. I do not find the use of harmful matter under [section] 1204.066, subdivision (a)(9) to be true [in count 15]. There will be no true finding as to that.  
[¶] . . . [¶]

"At the bottom of page 11 of the information is the statement that the People were also alleging the multiple victim allegation pursuant to . . . section 1203.066, subdivision (a)(7) with respect to specified counts. I think I previously made specific findings with respect to each count. But I find that allegation has been met with respect to counts 1 through 4 and with respect to counts 15 and 17."<sup>6</sup>

After the court announced its findings, it addressed the parties regarding, among other things, the complexity of the so-called "one strike sentencing laws."

"A presentence report is ordered from the probation department. Both counsel are invited to file any sentencing memoranda that they would like to file before that time. I would certainly invite, but not require, sentencing memoranda from both counsel that would propose a sentencing calculus and the reasons for it. And I think we all know the complexities that exist with respect to the so-called one-strike sentencing laws with qualifying sex offenses. So I will block out . . . the morning for [sentencing]. This needs to be done as carefully as we can."

#### E. *Sentencing*

At sentencing, the trial court found counts 1, 2, 3, 4, 15 and 17 subject to the indeterminate sentencing law and found the "allegations for this purpose are the more than one victim allegation under section 667.61[, subdivisions] (b)[,] (c) [and] (e)." The court then pronounced sentence on these counts as follows:

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<sup>6</sup> As noted *ante*, other than count 16, the trial court found Culbertson guilty of all remaining counts.

"I conclude as a matter of law that each of those counts requires a term of 15 years to life, and that term[] is imposed for each [count].

"Now, that doesn't answer the big question in this case. That's the question of whether these counts and other counts should run consecutively or concurrently. The court has the option of running them all concurrently or all consecutively or nearly any combination thereof provided that the court exercises its discretion according to law.

"What that means is that the court has a certain amount of leeway. Two judges might see the same issue differently and decide it differently, and as long as neither one of them is way outside the bounds of reason, then it's considered an appropriate exercise in discretion.

"The court's discretion, though, is not just whatever the court feels. The court needs to look at the law, the sentencing rule. In this case I'm going to refer to rule 4.425 of the Rules of Court, and I'm also going to refer to other factors in aggravation and mitigation. I'm going to do that all right now so that it's clear that I've considered these factors.

"The rule asks whether the crimes and the objectives of the crimes are predominately independent of each other. One could say, 'Well, no, because it's just sexual gratification.' I think that's too simple and too narrow a reading.

"Each one of the sex acts here was a separate act of exploitation of and corruption of a child. Moreover, Mr. Culbertson had the chance each time after committing the last act not to do it again, and yet having that opportunity and that freedom of will, he chose to reoffend and revictimize again and again and again.

"Moreover, he uniquely corrupted his own children by getting them to recruit their friends. Each victim in this case is a—let me begin that again.

"There are some counts where we know from the testimony more than one child was involved in the very same act, the very same episode. Well, each one of those children is a separate victim, and I think the fact that it might have been in the same episode doesn't control or require a concurrent term where you have a separate victim in each one of these children in that episode.

"The length of time that this offense went on is significant. It went on not for months, but years. [Defense counsel] argues in his brief and I think makes a good argument that asks the court to regard this as a single period of aberrant behavior. I respectfully disagree.

"I think that the length of time this went on and the different acts and different victims and the recruiting of new victims, this can't be deemed just a single period of aberrant behavior. This was repeated independent criminal conduct.

"It is true that I was impressed by the way these young women and young men testified in this courtroom. They showed some remarkable resilience, and I have high hopes that they will rebound. And it would be my hope that each one of them could come to view what was visited upon them the way [Y.] does, and that is that it doesn't damage in the sense of making a person damaged goods because they have been victimized like this.

"But that's not to say these children haven't been hurt. They have been hurt. And the data is clear across the board in this field that the repercussions of this kind of conduct lasts for years and years and can last for years and years. [¶] . . . [¶]

"With respect to the indeterminate counts, I also want to the record to reflect that I went through my notes and made sure that we weren't overlapping or charging the same incident twice, and I'm satisfied that we were not.

"I won't repeat the facts for each count here because I don't think any of us need to hear it, but I am satisfied that counts 1, 2, 3, 4, 15 and 17 were each supported by the evidence in the record. Each requires a term of 15 years to life. And for the reasons that I've just stated, those terms will run consecutively to each other.

"Counts 1, 2, 3, 4, 15 and 17 will all run consecutively to one another. The total term, therefore, with respect to the indeterminate counts is 90 years to life. [¶] . . . [¶]

"There comes a point where you might say, 'What does it matter if you run the other counts consecutively or concurrently?' If you run them consecutively, you're just piling on—it just becomes meaningless.

"I do have concern sometimes that the law appears that way, but there's another concern that I think is significant, and that is this: if a person commits an offense like this once, that's blameworthy. If [a person] does it a second time, that's more blameworthy, and if [a person] does it a third time, that is still more blameworthy.

"And I think whether it makes a practical difference on his release date or not, the term that the court imposes provides a rough yardstick of the blameworthiness of the

conduct. I think, as you can gather, that this conduct was blameworthy in the extreme, and that's why the consecutive term on those indeterminate counts."

## DISCUSSION

### A. *Sufficiency of the Evidence Involving Counts 1-4 and 15*

#### 1. *Standard of Review*

In addressing a challenge to the sufficiency of the evidence at trial, we review the entire record in the light most favorable to the judgment of conviction and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Davis* (1995) 10 Cal.4th 463, 509.) Our task is to determine whether there is in the record substantial evidence—evidence that is reasonable, credible, and of solid value—such that a reasonable juror could find the defendant guilty beyond a reasonable doubt. (*Ibid.*; see also *People v. Osband, supra*, 13 Cal.4th at p. 690.)

When evaluating the record to determine whether it contains substantial evidence to support the judgment of conviction, we "resolve[] neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (See *People v. Young* (2005) 34 Cal.4th 1149, 1181.)

We " 'must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.' [Citation.] 'Before the judgment of the trial court can

be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact].' [Citation.]" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573; see also *People v. Hicks* (1982) 128 Cal.App.3d 423, 429.) Thus, " '[i]f the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.'" [Citations.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

As noted *ante*, among other offenses Culbertson was charged with four separate lewd acts involving his daughter—two involving masturbation (counts 1 and 2, first and last incident) and two involving oral copulation (counts 3-4, same). Culbertson also was charged with one act of masturbation with respect to his older son (count 15).

## 2. Additional Background and Analysis (Counts 1, 2 and 15)

The older son testified on direct examination that when he and his twin sister were 12 years old and in the 6th grade, his father, in an effort to teach his children about sex, had the twins remove all their clothes and then talked to them about their "body parts." The older son testified this incident occurred in his father's bedroom—the room with the "mirror" and "all the weights"—as follows:

"Q: [Prosecutor]: So he [Culbertson] had you both—you are both—you and [your twin sister] are both naked, you are in the 6th grade, right?

"A: [Older Son]: Yes.

"Q: And your dad is in there as well, right?

"A: Yes.

"Q: Was your dad dressed, or did your dad take his clothes off?

"A: He was dressed.

"Q: Now, in the 6th grade, when you are both 12 and you are both now naked in your dad's bedroom and he is teaching you about sex, what is he doing?

"A: He was pointing at [my twin sister's] body parts and telling me what they were. And then he pointed at mine and told me what parts of—my body parts [were] called.

"Q: Did your dad ask you in any way to touch [your twin sister] at that time?

"A: Yes.

"Q: So you then—now we are in the 6th grade, right?

"A: Yes.

"Q: And so when he said touch [your twin sister] in the 6th grade, did you touch her?

"A: Yes.

"Q: What part of her body did you touch?

"A: Her breasts.

"Q: Any other parts of her body that you touched?

"A: No.

"Q: Did [your twin sister] touch your body?

"A: Yes.

"Q: Again, we are talking about the 6th grade when you are both 12, right?



"A: Yes.

"Q: What part of your body did [your twin sister] touch?

"A: My penis.

"Q: How many times did—did that only happen in the 6th grade one time, or did it happen more than . . . once, again, when you were in the 6th grade?

"A: 6th grade it happened twice.

"Q: The other time it happened—so you talked about one time in your dad's bedroom. What part of the house did it happen the second time?

"A: In the living room.

"Q: And it is, again, your dad, it is you and [your twin sister], right?

"A: Yes.

"Q: And, again, both of you are in 6th grade [in] middle school, right?

"A: Yes.

"Q: Do you remember how you talked about how he had you both take off all your clothes the first time in his bedroom?

"A: Yes.

"Q: Did he do that again in the living room, have you both take off your clothes?

"A: Not all.

"Q: Some of your clothes?

"A: Yes.

"Q: What parts of your clothes?

"A: With me, I had my bottom parts off, my pants and my underwear. [My twin sister] was fully naked.

"Q: So [your twin sister] had all her clothes off?

"A: Yes.

"Q: And you still had your shirt [on]?

"A: Yes.

"Q: But you had your pants and your shorts off?

"A: Yes.

"Q: So you are naked from the waist down?

"A: Yes.

"Q: Your penis is exposed?

"A: Yes.

"Q: And you can see your sister's breasts and vagina, right?

"A: Yes.

"Q: The second time that this happens in the living room, did your dad ask you to touch [your twin sister]?

"A: Yes.

"Q: Did you touch [your twin sister]?

"A: Yes.

"Q: What part of her body did you touch?

"A: Her breasts and her vagina.

"Q: Did your dad ask you to touch her breasts?

"A: Yes.

"Q: Did he ask you to touch her vagina?

"A: Yes.

"Q: Now, did [your twin sister] touch any part of your body?

"A: Yes.

"Q: What part of your body did she touch?

"A: My penis.

"Q: Did your dad ask her to touch your penis?

"A: Yes.

"Q: Would those be the two incidents in the 6th grade when you are both 12?

"A: Yes.

"Q: First in the bedroom, the mirrors, the room with the mirror and the weights, right? And then—is that right?

"A: Yes.

"Q: And then the reason I am asking again is because it is really important. I want to make sure this is accurate. And then the second time in the living room, right?

"A: Yes."<sup>7</sup>

We conclude the above testimony by the older son is more than sufficient evidence to support Culbertson's conviction for violation of former<sup>8</sup> section 288,

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<sup>7</sup> The daughter testified she could not remember engaging in sexual activities with her twin brother in middle school, but acknowledged it could have happened.

subdivision (a) in counts 1 and 2, first and last incident (the daughter), and in count 15 (the older son).

Former section 288, subdivision (a) provided in part: "Any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ."

Here, the older son's testimony clearly shows that both he and his twin sister were in 6th grade and 12 years old at the time both touching incidents occurred when their father allegedly was teaching them about their "body parts." The record also shows that Culbertson directed these activities because, according to his older son, "One minute [my father] would tell me that this is what my sister, she want[ed] to do with me. And other times he would ask that's what he wanted to see and he want[ed] us to perform sex on each other . . . ." Such evidence is more than sufficient to support Culbertson's conviction for violation of section 288, subdivision (a) in counts 1, 2 and 15.<sup>9</sup> (See *People v. Martinez* (1995) 11 Cal.4th 434, 445 [in determining whether a perpetrator had the specific intent to obtain sexual gratification for purposes of section 288, the trier of

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<sup>8</sup> Section 288 was amended effective September 2010. That amendment is not relevant to our discussion and also postdates the conduct charged in these counts.

<sup>9</sup> Culbertson's legal challenge to his conviction on these counts involves what he claims is inconsistent testimony by his older son, discussed *post*, as opposed to the lack of evidence on or more of the elements of section 288, subdivision (a).

fact looks to all the circumstances to infer the perpetrator's intent, which generally is incapable of direct evidence].)

*3. Additional Background and Analysis (Counts 3 and 4)*

Culbertson was also convicted for violation of former section 288, subdivision (a) in counts 3 and 4 for oral copulation, first and last incident, involving his daughter.

The daughter testified that when she was in the 7th grade, she asked her father about sex because she was curious and heard others talking about it. She also testified she masturbated and orally copulated her father in the family garage when she was 13 years old in 7th grade:

"Q: [Prosecutor]: Do you ever remember putting your mouth on your dad's penis, the first time that happened?

"A: [Daughter]: Yes.

"Q: What grade were you in the first time that happened?

"A: 7th.

"Q: 7th grade?

"A: Yes. [¶] . . . [¶]

"Q: You remember it being in the 7th grade?

"A: Yes.

"Q: Do you remember where that happened the first time?

"A: In the garage.

"Q: Do you remember how that started and by whose idea? Was it yours or your dad's to do that?

"A: I remember I know it wasn't mine.

"Q: Okay. [¶] Do you remember who brought up the idea about doing—you putting your mouth on your dad's penis in the garage when you were in 7th grade?

"A: I don't remember.

"Q: You just remember that happened?

"A: I just remember it happening.

"Q: Do you remember if your [twin brother] was in the garage when that happened?

"A: He wasn't.

"Q: Do you know what the term masturbate means?

"A: Yes.

"Q: And that's when you stroke somebody's penis or they do it to themselves, right?

"A: Yes.

"Q: Did you ever do that to your dad?

"A: Yes.

"Q: Do you remember the first time that happened?

"A: Yes.

"Q: When was that?

"A: In the garage.

"Q: And you were in 7th grade?

"A: Yes I was. [¶] . . . [¶]

"Q: When you were in the 7th grade and you talked about the incident where you put your mouth on your dad's penis in the garage, remember that?

"A: Yes.

"Q: Did that happen more than once in the 7th grade, if you remember?

"A: I only remember it happening once.

"Q: How about when you talked about masturbating your dad, stroking your dad's penis, one time in the garage, 7th grade, you are 13. Do you remember it happening more than once or only once? Whatever you remember.

"A: Only once."<sup>10</sup>

The daughter also testified that she could not remember any other sexual activities between her and her father while she was in the 7th grade, other than the incident in the garage when she orally copulated her father and masturbated his penis. The daughter admitted, however, that there *may* have been other sexual acts during that year but that she could not remember them.

The older son, however, testified to another incident involving him, his twin sister and their father that occurred in 7th grade when they were 13 years old:

"Q: [Prosecutor]: When you are in the 6th grade and you and [your twin sister] and your dad together, did you ever see [your twin sister] touch your father, and I mean touch his penis, ever?

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<sup>10</sup> The daughter's testimony about masturbating her father's penis in the garage in the 7th grade when she was 13 years old separately supports Culbertson's conviction for violation of section 288, subdivision (a) for purposes of *either* count 1 *or* count 2.

"A: [Older Son]: Yes.

"Q: In the 6th grade?

"A: 6th grade, not that I can remember.

"Q: How about the 7th grade?

"A: Yes.

"Q: How many times did you actually see [your twin sister] touching your dad's penis, again, not from what people tell you, but you see it yourself? How many times did you see that happen? Was it more than once?

"A: Yes, more than once.

"Q: Was it the on and off thing?

"A: Yes.

"Q: And when you say you saw [your twin sister] touch your dad's penis in the 7th grade—you have to testify to this, I am not going to put words in your mouth, so you tell me—by touching, specifically, how did [your twin sister] touch your dad, from what you saw?

"A: She would be jerking off my dad's penis and giving—and sucking on it.

"Q: Was that more than once?

"A: Yes.

"Q: And that's the on and off?

"A: Yes.

"Q: Did all of these incidents occur . . . [at the family residence]?

"A: Yes."



We conclude the above testimony of the twins constitutes sufficient, substantial evidence to support Culbertson's convictions for violation of former section 288, subdivision (a) with respect to counts 3 and 4, oral copulation, first and last incident, involving his daughter, then a minor then under the age of 14.

But there's more. The older son also testified that when he and his twin sister were 13 years old, he awakened late one night, went into the kitchen and saw his sister naked and orally copulating their father's erect penis. In response, Culbertson directed his older son to come closer and as he approached, the older son took off some of his own clothes and his twin sister then began orally copulating him. When asked why he took off his own clothes that night in the kitchen, the older son testified he did so because "that's what I thought my dad wanted to see." We conclude this additional testimony by the older son also satisfies the elements of former section 288, subdivision (a) in support of Culbertson's convictions on *either* count 3 *or* count 4.

Despite overwhelming evidence in the record to support Culbertson's convictions in counts 1 through 4, and 15, as described hereinabove, he argues that his convictions on those counts must be reversed because the trial court did not specify what conduct went with what count when handing down its judgment on these counts and because his older son gave testimony on redirect that conflicted with some of his earlier testimony on direct.

Specifically, when the older son testified on redirect five days after his original testimony, he confirmed that he and his twin sister were in 6th grade when his father made them remove all their clothes and touch each other as described above. However,

unlike his earlier testimony, on redirect the older son testified there was no second incident of sexual conduct directed by his father involving the twins in the 6th grade (e.g., in the living room). Instead, the older son testified about the incident in the kitchen (described above), when he saw his twin sister orally copulating their father late one night.

That there may have been conflicting testimony in the record among the witnesses—for example between the daughter and her twin brother, where one witness recalls one event and the other does not—or even conflicting testimony by the same witness—including in this case by the older son five days after his original testimony—does not mean that none of the conflicting evidence can be relied on by the trial court as the finder of fact and/or by this court, in its substantial evidence review to determine whether the record contains sufficient "substantial" evidence to support Culbertson's convictions on counts 1 through 4 and 15.

Contrary to Culbertson's contentions that he was convicted on these counts through "guesswork" and "speculation," the above testimony by the twins regarding incidents of sexual misconduct by their father, which began when they were in middle school (before the age of 14), fully supports the trial court's findings in connection with Culbertson's convictions in counts 1 through 4 and 15. We reject Culbertson's challenge to his convictions on these counts, which we suggest is nothing more than a request by him of this court to reweigh the evidence (see *People v. Bolin* (1998) 18 Cal.4th 297, 333) and/or determine anew the credibility of the witnesses. (See *People v. Young*, *supra*, 34 Cal.4th at p. 1181.)

## B. *Ex Post Facto*<sup>11</sup>

Both the federal and state Constitutions prohibit ex post facto laws. (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9.) That means the court may not impose greater punishment than could have been imposed at the time a crime was committed. (*Collins v. Youngblood* (1990) 497 U.S. 37, 42–43 [110 S.Ct. 2715]; *People v. Grant* (1999) 20 Cal.4th 150, 156–157.) In applying the ex post facto clause, "[t]he critical question is whether the law changes the legal consequences of acts completed before its effective date." (*Weaver v. Graham* (1981) 450 U.S. 24, 31 [101 S.Ct. 960].)

California's one strike law (e.g., § 667.61, subd. (b)) requires a sentence of 15 years to life for a person convicted of certain enumerated sexual offenses under particular aggravating circumstances. Before section 667.61, subdivision (b) was amended by the Legislature on September 20, 2006, and shortly thereafter after passage of Proposition 83 (Historical and Statutory Notes, 49 West's Ann. Pen. Code, *supra*, foll. § 667.61, at p. 401; Prop. 83, § 12, as approved by voters, Gen. Elec., (Nov. 7, 2006)), former section 667.61 provided in pertinent part:

"(b) [A] person who is convicted of an offense specified in subdivision (c) [e.g., includes a violation of subdivision (b) of section 288] under one of the circumstances specified in subdivision (e) [e.g., includes the 'defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more

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<sup>11</sup> We note parenthetically that Culbertson did not forfeit his ex post fact claim by failing to raise it at sentencing. (See *People v. Hiscox* (2006) 136 Cal.App.4th 253, 258–259 [noting that an "ex post facto violation resulting in an unauthorized sentence may be raised on appeal even if the defendant failed to object below."].)

than one victim'] shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years . . . . [¶] . . . [¶]

"(g) The [15-year-to-life] term specified in subdivision . . . (b) shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. If there are multiple victims during a single occasion, the term specified in subdivision . . . (b) shall be imposed on the defendant once for each separate victim. Terms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable." (Stats. 2006, ch. 337 (S.B. 1128).)

Following the passage of Proposition 83, section 667.61 provides in pertinent part:

"(i) For any offense specified in paragraphs (1) to (7), inclusive, of subdivision (c), the court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6."

Section 667.6, subdivision (d), to which section 667.61, subdivision (i) refers, states that a court shall consider "whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior" in determining if the crimes were committed on "separate occasions" for purposes of subdivision (i) of section 667.61.

Here, Culbertson contends that *all* of the evidence regarding counts 1 through 4 and 15, on which he was sentenced to consecutive, 15-year terms under the one strike law, allegedly "involved conduct *prior* to September 20, 2006" when the twins were

between the ages of 11 and 12 years old. Thus, according to Culbertson, only former section 667.61 applies to him as that was the version of the statute in existence at the time.

Culbertson relies on *People v. Jones* (2001) 25 Cal.4th 98 to contend further that the trial court erred because it sentenced him to too many consecutive life terms based on the evidence. Briefly, in that case the defendant grabbed the victim by the neck as she was walking home, forced her into a garage and then inside the backseat of a car. Over the course of an estimated hour and a half time period, the defendant forced the victim to orally copulate him, then raped and sodomized the victim. (*Id.* at p. 101.) Pursuant to former section 667.61, subdivisions (a), (c) and (d)(2), the trial court sentenced the defendant for the sex offenses to three consecutive terms of 25 years to life after the jury found the defendant guilty of, among other offenses, forcible rape, three counts of forcible sodomy and forcible oral copulation. (*Id.* at p. 102.) In handing down the sentence, the trial court found that the oral copulation, the rape and the sodomy "occurred on a separate occasion with the same victim." (*Ibid.*)

Our Supreme Court reversed. In addressing whether a one strike term could be imposed on more than one count, our high court contrasted the phrase "single occasion" in former section 667.61, subdivision (g) with the phrase "separate occasion" in section 667.6, subdivision (d), *ante*, and noted former section 667.61, subdivision (g), unlike section 667.6, subdivision (d), provided no statutory guidance in determining whether the offenses were committed on a "single occasion." (*People v. Jones, supra*, 25 Cal.4th at p. 104.)

Because of the harshness of the punishment permitted under the one strike law and the lack of definitive legislative direction, the court in *People v. Jones* concluded that the "Legislature intended to impose no more than one such sentence per victim per episode of sexually assaultive behavior" (*People v. Jones, supra*, 25 Cal .4th at p. 107) and concluded that sex offenses occurred on a "single occasion" within the meaning of former section 667.61, subdivision (g) "if they were committed in close temporal and spatial proximity." (*Ibid.*) In remanding the case for resentencing, the court in *People v. Jones* instructed, "the rule we adopt should result in a *single* life sentence, rather than *three* consecutive life sentences, for a sequence of sexual assaults by defendant against one victim that occurred during an uninterrupted time frame and in a single location." (*Ibid.*)

Here, assuming without deciding that Culbertson is correct that former section 667.61 solely applies to him (e.g., that all sexual conduct in counts 1 through 4 and 15 occurred before September 20, 2006), we nonetheless reject Culbertson's contention that the trial court imposed too many life sentences on him under former section 667.61.<sup>12</sup>

As discussed *ante*, there is substantial evidence in the record supporting his conviction under former section 288, subdivision (a) when he brought the twins into his bedroom and made them touch each other sexually while he watched. This conduct, involving "multiple victims during a single occasion" (see former § 667.61, subd. (g)),

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<sup>12</sup> Culbertson does *not* argue on appeal that the trial court abused its discretion and thus erred when it imposed *consecutive* as opposed to *concurrent* life sentences on him pursuant to California's one strike law. (See § 669.)

provides the basis to sentence Culbertson to two consecutive terms of 15 years to life on counts 1 (his daughter) and 15 (his older son).

The record also supports Culbertson's single indeterminate sentence of 15 years to life under former section 667.61 on count 2, given the evidence of a second episode of touching in the living room (e.g., at a different time and at a different location than the first incident (see *People v. Jones, supra*, 25 Cal.4th at p. 107)) involving the twins, when Culbertson again made them show each other their "body parts" and touch each other sexually in his presence.

In addition, the record shows that this type of sexual touching between the twins—organized and encouraged by Culbertson—occurred "every now and then" according to the older son when the twins were 13 (e.g., under 14 years of age for purposes of former section 288, subdivision (a)). The older son testified that "every now and then" meant roughly "a couple [of] months." This additional evidence further supports Culbertson's conviction under former section 288, subdivision (a) and the imposition of a single 15 to life indeterminate sentence on count 2.

Turning next to counts 3 and 4, given the testimony of the daughter that she orally copulated her father in the garage (when she was 13 years old) and the testimony of the older son that he saw his twin sister orally copulating their father in the kitchen late one night which ultimately led his sister to orally copulate him, we conclude the trial court did not error when it sentenced Culbertson to 15 years to life on each count. Indeed, the record shows both incidents occurred at different times and in different locations, and

thus were not in close temporal proximity to each other for purposes of former section 667.61, subdivision (g). (Compare *People v. Jones*, *supra*, 25 Cal.4th at p. 107.)

In sum, we conclude the trial court did not err in sentencing Culbertson under the one strike law on counts 1 through 4 and 15.

*C. Sufficiency of the Evidence Involving Count 7*

Finally, Culbertson contends there was insufficient evidence to support his conviction in count 7 for violation of former<sup>13</sup> section 288, subdivision (c)(1) because the prosecution failed to satisfy its burden to show that his daughter was under 16 years of age when he had sexual intercourse with her. Thus, Culbertson seeks a reversal of the eight-month consecutive sentence the trial court imposed on him under count 7.

Former section 288, subdivision (c)(1) provided: "Any person who commits an act described in subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child, is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year. In determining whether the person is at least 10 years older than the child, the difference in age shall be measured from the birth date of the person to the birth date of the child."

Here, the record contains conflicting testimony regarding when the daughter and her father first had sexual intercourse. The daughter testified on direct that she could not

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<sup>13</sup> See footnote 8, *ante*.



remember the first time she had sexual intercourse with her father, but *thought* it was when she was in high school.

However, later on cross-examination the daughter testified she had sexual intercourse with her father when she was in 7th grade:

"Q: [Defense Counsel]: You were asked [by the prosecutor] about having had sexual intercourse with your father at some point?

"A: [Daughter]: Yes.

"Q: Is it true that you don't remember when the first time occurred?

"A: Can you repeat that?

"Q: Is it true that you don't remember when that occurred for the first time?

"A: I do remember. But I'm not accurate about it. I know it happened in middle school. I know it was in 7th grade *for sure*. (Italics added.)

"Q: Did you tell somebody that it [e.g., sexual intercourse] happened for the first time in high school?

"A: Can you repeat that?

"Q: Do you remember talking to the detective here . . . ?

"A: Yes.

"Q: You told her all about the case?

"A: Yes.

"Q: Told her the truth?

"A: Yes.

"Q: Did you tell her that the first time you had sexual intercourse with your father was you were in high school and it was in the past year, the year before your last court hearing? Do you remember telling her that?

"A: I don't remember."

We conclude the daughter's testimony, albeit conflicting, that she "for sure" had sexual intercourse with her father when she was in the 7th grade is more than sufficient evidence in the record to support Culbertson's conviction in count 7 for willfully committing a lewd and lascivious act on a child under the age of 16. (See § 288, subd. (c)(1); see also *People v. Bolin*, *supra*, 18 Cal.4th at p. 333; *People v. Young*, *supra*, 34 Cal.4th at p. 1181.)

#### DISPOSITION

Culbertson's judgment of conviction and his sentence are affirmed.

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BENKE, J.

WE CONCUR:

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McCONNELL, P. J.

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HALLER, J.